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In The

Supreme Court of the United States

October Term, 1972

No. 72-1141

ALBERT DE POMPEIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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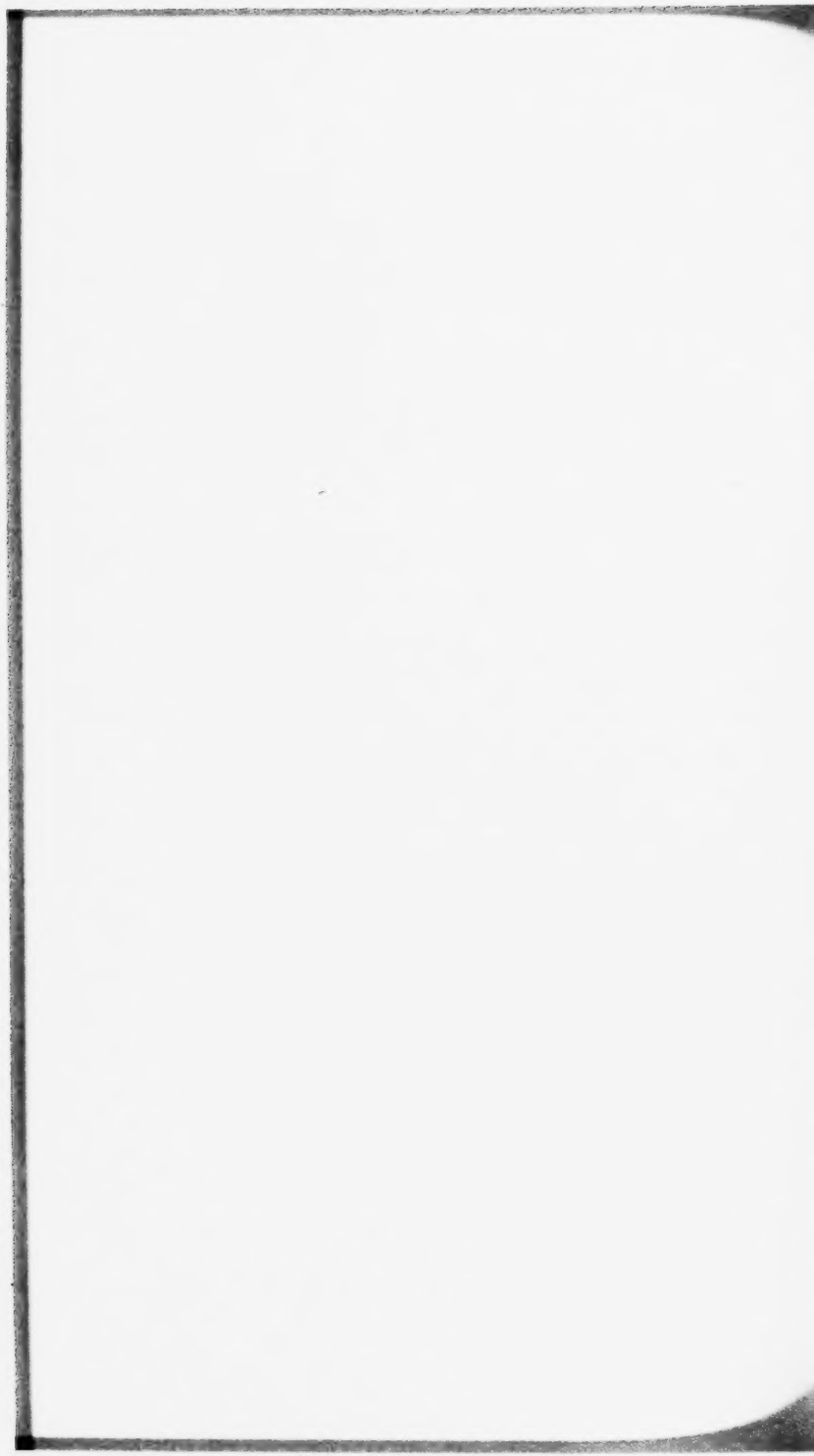

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In The

Supreme Court of the United States

OCTOBER TERM, 1973

No.

ALBERT DE POMPEIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner Albert De Pompeis, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction in the United States District Court for the Eastern District of New York.[1]

1. Albert De Pompeis was indicted and tried in the United States District Court for the Eastern District of New York with co-defendant Mary Alberti. The Court's attention is invited to the petition for a Writ of Certiorari filed by Alberti to this Court, October Term, 1972, in view of the fact that De Pompeis has joined in some of the points raised by her petition.

Opinion Below

The opinion of the Court of Appeals is not yet reported. It is set forth in Appendix A to this Petition (1a).[2] No opinion was rendered by the District Court for the Eastern District of New York.

Jurisdiction

The opinion of the Court of Appeals was filed on December 22nd, 1972. The petition for rehearing was denied January 23rd, 1973 (11a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The pivotal Government witness against petitioner-defendant Albert De Pompeis[3] was one Lawrence Silverman who claimed in his trial testimony to have made three (3) different purchases of counterfeit currency from De Pompeis. Counsel for De Pompeis attempted to interrogate Silverman as to a forcible sodomy committed against a woman twice his age by entering her anus with his private parts in order to impeach the credibility of the witness. The Court refused this line of confrontation.

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2. References to the Court of Appeals Opinion (Appendix A, hereto) are cited herein at "O". References to the Petitioner's Joint Appendix in the Court of Appeals are cited as "A" and reference to the trial record filed in the Court of Appeals are cited as "R". Reference to the transcript of the trial court session prior to the selection of the jury are cited as "T".

3. Hereinafter referred to as "De Pompeis."

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Further, trial counsel for co-defendant Mary Alberti[4] was also the attorney for the principal Government witness who testified to events involving the conspiracy to print counterfeit currency. The attorney for Alberti indicated the apparent conflict in interest involving his legal representation of both and also indicated that the same Government witness had exonerated in statements to him Alberti completely, which if believed would have also absolved De Pompeis of the conspiracy count. The trial court never resolved this apparent conflict and therefore De Pompeis was never in a trial posture to call to the jury's attention the apparent exoneration of Alberti enuring to his benefit.

Within the context of both factual questions, the following points are raised under the due process clause of the Fifth Amendment and the rights to confrontation and compulsory process under the Sixth Amendment:

1. Was it proper for the trial court to limit confrontation of a principal Government witness by refusing to allow defense counsel to interrogate him as to a forcible sodomy as effecting credibility?

2. Upon becoming aware of the facts underlying the potential conflict of interest between the co-defendant and the key Government witness in that both were represented by the same attorney, should the trial court have conducted a hearing as to the competing interests, re-

4. Hereinafter referred to as "Alberti."

solved the issue and advised the defendants that they were free to call him on the issue of exonerating them on the charge of conspiracy and the other counts in the indictment?

Consitiutional and Statutory Provisions Involved

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia; when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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18 U.S.C. §371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §473

Whoever buys, sells, exchanges, transfers, receives or delivers any false, forged, counterfeited, or altered obligation or other security of the United States with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U.S.C. §2

Principals. - (a) Whoever commits an offense against the United States or aids, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another

would be an offense against the United States, is punishable as a principal.

Statement of the Case

I. The Indictment, Conviction and Sentence

The Indictment in the United States District Court for the Eastern District of New York carried Docket No. 71 Cr. 1187 (A6a) and was filed November 18, 1971, and charged Mary Alberti, Albert De Pompeis and Anthony De Robertis in eleven counts with conspiracy, possession and sale of forged and counterfeit money. De Robertis pleaded guilty to count eleven, 18 U.S.C. §371 (conspiracy) on February 8th, 1972, before trial. Co-defendants and now petitioners De Pompeis and Alberti proceeded to trial.

Alberti was found guilty of 18 U.S.C. §371 (conspiracy) and three separate counts of possession and sale of forged and counterfeit money all in violation of 18 U.S.C. §473.

De Pompeis was named in counts 8, 9 and 10 of the indictment charging violations of 18 U.S.C. §473 and §2 (Dealing in counterfeit obligations or securities) and count 11 charging a conspiracy under 18 U.S.C. §371. He was convicted on all counts and was sentenced pursuant to 18 U.S.C. §4208(a) to four (4) five (5) years concurrent terms on jury verdicts of guilty to three (3) violations of 18 U.S.C. §473 (Dealing in counterfeit obligations or securities) and a violation of 18 U.S.C. §371 (Conspiracy to commit an offense or to defraud the United States).

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Statement of Facts

A. The Government's Case

(1) The Counterfeit money is printed.

In July, 1970, Government witness Paul Hayman, a commercial and job printer (Hayman: R21) with two previous federal convictions for counterfeiting[5] met Alberti by telephone prearrangement (Hayman: R23). The conversation related to the printing of $10 notes (Hayman: R24). Hayman was unpersuaded by Alberti to enter the venture and returned to his home and printing business in Delaware (Hayman: R24). However, in August 1970, the two met again in New York City and Hayman, although still somewhat recalcitrant agreed to print the money (Hayman: R26).

Hayman and Alberti were partners while a third person, one Edward E. Korjus, himself arrested and sentenced on the instant charges and with still another new and subsequent arrest also for counterfeiting (Korjus: R160), was to make deliveries of the fraudulent money. Alberti was to financially renumerate Korjus from her end of the bargain (Hayman: R26).

During the latter part of August, 1970, Alberti traveled to Delaware with Korjus and learned

5. Hayman was sentenced in the United States District Court for the Eastern District of New York to a term of three (3) years. He was under service of this sentence when he testified at the trial of De Pompeis and Alberti. This sentence commenced January 4th, 1971 (Hayman: R22). Also a further federal conviction in Delaware for counterfeiting resulting in an additional two year sentence is to follow the instant service of this three (3) year sentence (Hayman: R30).

that Hayman had not yet printed the counterfeit money. It was however agreed by Korjus, Alberti and Hayman that 20,000 ten dollar notes were to be printed for a total face but fraudulent value of $200,000 (Hayman: R30). The profits were to be equally split (Hayman: R30; Korjus: R129, 132).

Three or four weeks later at the beginning of September, around Labor Day, Alberti with Korjus returned to Hayman's Delaware Printing Shop (Hayman: R31; Korjus: R132). The printing job had not been started but at the insistence of Alberti the counterfeit notes were completed that day (Hayman: R33; Korjus: R137). On completion of the job, the forged notes were loaded into the car. Hayman never recalled ever meeting De Pompeis (Hayman: R112). Korjus, who had previously been in a mental institution and considered himself presently alcoholic (Korjus: R205-206), testified that for his services he was to get 10% good money collected in exchange for the counterfeit currency (Korjus: R140). Alberti was planning on selling counterfeit money at 15% of the forged face value (Korjus: R141).

(2) Korjus and Alberti make three deliveries.

Two days after their return from Delaware with the counterfeit money which they had taken to Korjus' New York apartment, they met an Anthony De Robertis at his house (Korjus: R141; De Robertis: R370). De Robertis was impressed with the money and purchased $4,000 or $5,000 of it on credit (Korjus: R143; De Robertis: R370). A couple of days later, early in September, 1970,

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Alberti and Korjus sold to a man named George $10,000 worth of fraudulent bills (Korjus: R145). Some two days later again, Korjus met George by prearrangement with Alberti and negotiated himself an additional sale of $20,000 worth of counterfeit notes (Korjus; R149-150). Alberti and Korjus divided the proceeds received from George (Korjus: R150). De Pompeis was not involved in any of these transactions.

(3) Alberti in panic. The Secret Service in pursuit.

Subsequently, in September, 1970, Alberti sensed that the United States Secret Service had learned of her illegal activities and was in pursuit. She told Korjus to get rid of the counterfeit money in his possession and that she had already called a friend of his Angelo Cobian to help in this matter. Alberti asked Cobian to hold "important papers and a few little antique things" to which Cobian agreed (Korjus: R151-152). Korjus then took the counterfeit bills to Cobian but through oversight left some behind in his apartment which were later found on September 11, 1970, the date of his arrest by agents of the United States Secret Service (Korjus: R154, 156).

On September 10, 1970, Korjus turned over to Alberti the balance of the counterfeit money amounting to a face value of $24,000, in a brown bag (Korjus: R157). Alberti left Korjus with the counterfeit money for the apartment of a friend Terry Rogers (Korjus: R158). Alberti went directly to the New York City Hotel Oak-

dale apartment of Rogers, an admitted prostitute and cocktail waitress (Rogers: R214). Alberti was worn out and wanted to take a bath. She claimed that she was being followed by the Secret Service (Rogers: R216-217). Alberti asked Rogers to keep the brown paper bag containing the counterfeit bills but Rogers refused. Alberti then asked to call a friend on the telephone to which Rogers agreed (Rogers: R217). Alberti said that her friend Al was coming over for her. An hour and a half later Albert De Pompeis arrived (Rogers: R219-220). After a private conversation between De Pompeis and Alberti, De Pompeis convinced Rogers to keep the bag of counterfeit currency until such time as other arrangements could be made. Rogers agreed (Rogers: R225, 227).

The following day, September 11, 1970, Korjus and Alberti were arrested by Secret Service agents (Korjus: R155).

(4) De Pompeis recovers the money from Rogers and makes three sales.

On or about September 13th, 1970, De Pompeis called Rogers and told her that Korjus and Alberti were arrested (Rogers: R228). De Pompeis requested that Rogers deliver to him the counterfeit currency at a certain bar. Rogers did not go to the appointment (Rogers: R229). De Pompeis called again and Rogers told him that she was destroying the fraudulent money. Finally, agreement was reached between the two that a man unknown to Rogers with a cover name of "Uncle Herman" would call for the money (Rogers: R230).

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On or about September 14th, 1970, a man did appear at the Rogers' apartment and collected the counterfeit currency (Rogers: R232). At the time of Roger's arrest on September 24th, 1970, agents found in her apartment three $10 counterfeit bills (Rogers: R233-234). While under arrest agents arranged for Rogers to make a telephone call to De Pompeis which was recorded. The conversation did not mention counterfeit money but Rogers told De Pompeis that she had a customer. A meeting was arranged between them over the telephone but De Pompeis never kept the appointment (Rogers: R236).

Lawrence Silverman, a full-time art student, knew De Pompeis only as "Piazza Al" (Silverman: R419-420). De Pompeis approached him around September 15th, 1970, with regard to the sale and purchase of counterfeit bills $2,000 fake for $300 good money (Silverman: R420-422). Silverman went to Saul Zucker with the idea of making the purchases (Silverman: R421). Silverman made a purchase from De Pompeis in Queens around September 21st, 1970. At the end of September, Silverman made a second purchase of $10,000 counterfeit money in the Bronx for $1,500 good money (Silverman: R429, 436). A third purchase of $5,000 counterfeit currency was made around November 9th, 1970.

(5) <u>De Pompeis is arrested.</u>

Several days after her arrest and release around September 30th, 1970, Rogers received a call from Alberti asking to see her at the Shangri La Restaurant on 52nd Street and Broadway in Man-

hattan. De Pompeis was also to attend the meeting. Rogers advised the Secret Service. An agent accompanied Rogers to the meeting acting in an undercover capacity (Rogers: R239-240; Marchitello: R304). Alberti refused to say anything in the presence of a stranger (Secret Service Agent Marchitello) and he was asked to leave the meeting (Rogers: R240; Marchitello: R305). De Pompeis was arrested that evening getting into a car after being observed near the meeting place outside the restaurant and finally at a Howard Johnson Restaurant across the street (Rogers: R238-242; Marchitello: R305). No contraband was found on his person or in the automobile (Marchitello: R346-347). At the restaurant Rogers told Alberti that she had not furnished any information to the Secret Service (Rogers: R241).

B. The Defense (De Pompeis).

De Pompeis did not testify in his own behalf. No witnesses were called by the defense in behalf of De Pompeis as to the actual facts in issue.

C. Exoneration of Alberti.[6]

Prior to the selection of the jury on the first day of trial, defense counsel for Alberti, Michael Kenny, Esq., stated to the trial court that he had just learned that his client Korjus, might be called as a Government witness. Neither the prosecutor, Mr. Bashian, nor the trial court suggested any solution to the problem:

6. The fact pattern here is precisely raised by Alberti's appellate counsel in their petition in her behalf for a Writ of Certiorari in which De Pompeis joins and adapts as his own.

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"Mr. Kenny: Just for the record again, when, Mr. Korjus (sic) whose name came up at the motions this morning, when he pleaded guilty, he came to me and asked me would I represent him, starting with the time of sentencing, and I was substituted therefore in place of the Legal Aid Society which had represented him up until that time, since that occasion when he was sentenced I have had occasion to talk to him a number of times about the facts of this case. I now learn that he is going to be a witness possibly for the Government, and I just at this time don't know what position that puts me in in reference to the attorney-client relationship. If he offers himself as a Government witness, I believe I'll have a right to ask him any questions, even though I know information that he gave to me as a client.

The Court: What do you say about that, Mr. Bashian?

Mr. Bashian: I think it's the kind of thing that perhaps we ought to wait and see what happens when and if Mr. Korjus is called. After Mr. Kenny hears his direct examination, I think he will be in a better position to know exactly what problems he will envision at that time, perhaps we could have an out-of-court hearing. Some of these problems may not exist.

The Court: All right, gentlemen, 2:00 P.M. (T37-38)." (Emphasis supplied.)

Again, the trial court ignored the problem when the matter was brought to its attention at the close

of the first day's testimony. In this situation, the trial court was inferentially directing counsel not to speak to the witness, Korjus. Here, defense counsel was reminding the trial court that he was still representing the witness:

> "Mr. Kenny: And not to speak to me. As I pointed out to the Court at the beginning, I am technically still his attorney on the second charge.
>
> The Court: I will say just as I have admonished the jury not to speak to anyone about the case.
>
> Mr. Kenny: All right.
>
> The Court: That complicates situations. We have enough difficulties without bringing that into play" (R187). (Emphasis supplied.)

The subject of the conflict next arose after the witness had completed his direct testimony, and was being cross-examined by defense counsel. The following took place at the side bar:

> "The Court: I have been disturbed by the wasting of time in this case. I have observed that we are going over the same testimony on cross that was elicited on direct which doesn't serve any useful purpose. I think a lot of time is being wasted. Try not to go into matters that have been covered over and over again. The trial has been repetitious all the way through. It seems not a complex case and I would say from my own observations that we can avoid this wastage of time.

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Mr. Bashian: Very well.

Mr. Kenny: In the case of the two witnesses that have been heard, especially Korjus, I having been his attorney know that his testimony is contrary to what he has told me personally. When he spoke to me he exonerated Alberti completely. And that is the only reason I am trying to break him down.

The Court: The gist of the case is so clear. I am just passing this on to you. All of us can have different opinions but I thought it might be helpful to you just to mention these factors.

Mr. Bashian: We will take the advice" (R191-192). (Emphasis supplied.)

However, no additional steps were taken to make any determination as to the conflict of interest.

Reasons for Granting the Writ

Point I

THE COURT'S LIMITATION OF CROSS-EXAMINATION OF GOVERNMENT WITNESS SILVERMAN AS TO PREVIOUS IMMORAL AND VICIOUS ACTS EFFECTING CREDIBILITY WAS A VIOLATION OF DE POMPEIS' RIGHT TO CONFRONTATION AND FAIR TRIAL.

It is apparent from the Government's proof in the case below that De Pompeis neither initiated the printing of the counterfeit currency nor furthered initially its illegal purposes. The Government

in direct support of its case produced five material witnesses to the event: Paul Hayman, Edward E. Korjus, Anthony De Robertis, Terry Rogers and Lawrence Silverman. The first three — Hayman, Korjus and De Robertis — either did not even know De Pompeis or disavowed any knowledge of his participation in the counterfeit scheme. It is significant to note that the facts clearly reveal that Alberti, Hayman and Korjus — if the Government witnesses are to be believed — were actually the principal figures in the counterfeit conspiracy and the events that followed.

The Government's efforts to secure the conviction of De Pompeis rested with prostitute Terry Rogers and Lawrence Silverman. At most Rogers' uncorroborated claim that it was De Pompeis who persuaded her to keep the brown paper bag with counterfeit currency until such time as other arrangements could be made was tenuous to say the very least. Pivotal to the conviction of De Pompeis was Government witness Silverman who claimed three (3) purchases of counterfeit currency from De Pompeis in substantial amounts. Defense attorney Lyon during the course of trial recognized the explicit importance of Silverman's testimony when he advised the Court even before the witness testified (Lyon: A33a):

> ". . .Mr. Silverman, who is going to be the only real substantial witness against Mr. De Pompeis. . . ."

Mr. Lyon attempted in the District Court to fully question Silverman on prior immoral and vicious

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acts and conduct as material to his believability and decency (Lyon: A30a-31a). Particularly, attorney Lyon was interested in questioning Silverman on a completed forcible sodomy upon a woman twice his age entering her anus with his private parts (Lyon: A30a-31a). Assistant United States Attorney Bashian argued for the impeachment limitation (Bashian: A35a).

When Mr. Lyon attempted to question Silverman on the sodomy the Court prevented him from doing so and sustained the Government's objection. It furthermore declared at this point a ten (10) minute recess (District Court: A35a). When attorney Lyon subsequently attempted to impeach Silverman on the same subject matter the Court precluded defense counsel from so doing and admonished him, "Sustained, pay attention to the Court's ruling" (District Court: A36a). Attorney Lyon attempted to mark for identification Silverman's arrest and conviction record to show the basis for the question (Lyon: A37a-38a). The Court dismissed this attempt with, "I adhere to the prior ruling" (District Court: A38a).

It was defense attorney Lyon's contention that Silverman pleaded guilty on the sodomy to a reduced plea in the state court and that he should be permitted to question the witness on the underlying act as material to Silverman's credibility (Lyon: A30a). He was not permitted to pursue this line of impeachment.

Moreover, on the case for the defense, De Pompeis called a Sue Levine who declared that

Silverman's reputation was that of a "liar" (Levine: A45a). The trial court nevertheless refused to give any charge on character or reputation evidence relating to Silverman despite defense counsel's request (Lyon: A76a). The District Court felt it was "wholly out of order" (District Court: A76a).

De Pompeis did not testify at the trial below. He thus placed his innocence in issue primarily by the lack of believability and credibility of Government witness Silverman. Silverman's uncorroborated testimony resulted in three convictions of counterfeit currency involving De Pompeis. There was no other testimony whatsoever to warrant these convictions. The Silverman testimony in this connection must therefore be regarded as crucial. Moreover, on Rogers' testimony alone it is highly doubtful that as a matter of law a conviction against De Pompeis could be sustained or that a jury would return any guilty verdict. This is not therefore a case in which the Government produced overwhelming proof as to the guilt of De Pompeis on any of the four (4) counts for which he was ultimately convicted. United States v. Steele, 469 F.2d 165 (10th Cir. 1972).

We do not dispute elemental principles of law that the latitude of inquiry on cross-examination bearing on the credibility of a witness is discretionary with the trial court and its ruling are not subject to review unless it clearly appears that the discretion has been abused. However, here where the trial evidence was uniquely slight

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against De Pompeis it was a plain abuse and injustice not to permit inquiry as to Silverman's background and the underlying facts of the forcible sodomy.

Nor do we argue that a guilty plea may not rest upon the uncorroborated testimony of a witness-accomplice. United States v. Ferrara, 458 F.2d 868 (2nd Cir. 1972). We, however, feel that the testimony of an informer and/or an accomplice must be examined and weighed by the trial jury with greater care than the testimony of an ordinary witness. On Lee v. United States, 343 U.S. 747 (1952); Fletcher v. United States, 158 F.2d 321 (D.C. Cir. 1951). The case of a Government witness like Silverman is unlike the situation where a defendant testifies and the Court limits impeachment of the use of prior convictions. Luck v. United States, 348 F.2d 763 (1965); Gordon v. United States, 383 F.2d 936; United States v. Palumbo, 401 F.2d 270 (2nd Cir. 1971).

While the trial court did permit defense counsel to inquire if Silverman had been convicted of Assault 3, De Pompeis through his trial attorney had the right to question Silverman as to the underlying act and have the jury weigh its impact on credibility. It was the position of the Government, and the Court agreed, that Silverman should be shielded from inquiry because the act of sodomy even if true had no bearing upon his truth and veracity. While Silverman's Assault 3 conviction under New York law is not a crime of moral turpitude which on its face might not be denominated also a "crimen falsi," the underlying act of forcible sodomy was. Silverman's Assault 3 con-

viction was the result of a plea bargain. Only a minority of courts retain the "crimen falsi" limitation. United States v. Montgomery, 126 F.2d 151 (3rd Cir. 1952); Ciravolo v. United States, 384 F.2d 54 (1st Cir. 1967); Cf. Proposed Federal Rules of Evidence, Rule 6-09(a); United States v. Provoo, 215 F.2d 531 (2nd Cir. 1954).

Certainly if moral turpitude is "inherent baseness or vileness of principle" than an act of forcible sodomy falls within that category. Rudolph v. United States, 6 F.2d 487 (D.C. Cir. 1925); United States v. Cisneros, 191 F. Supp. 924 (N.D. Cal. 1961).

In United States v. Tomaiolo, 249 F.2d 683 (2nd Cir. 1957), the Court held that it was improper to go into the details of the offense but this rule applied to defendants which poses special problems. The impeachment limitation into Silverman's cross-examination cannot be considered harmless error since without the jury believing this witness it is obvious that no conviction could have resulted.

We respectfully urge the Court to consider the opinion of the Court of Appeals (9a-10a) and its conclusion of ". . . inasmuch as the conduct involved does not relate to truthfulness or untruthfulness, we disagree with this contention and hold that the District Court properly limited the cross-examination. See 3 Wigmore, Section 982 at p. 840; and Rule 608(b) of Proposed Federal Rules of Evidence for the United States Courts and Magistrates."

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We claim that on cross-examination the previous life and character of the witness Silverman is legitimate inquiry. The witness may be questioned as to his past life, recent and present history, as affecting his credibility. He may be asked any questions pertaining to his associations, surroundings, companions, manner and style of living, habits and conduct, which tend to discredit his testimony. In Osborne v. Seligman, 39 Misc. 811 at 812 stated our position in respect to Silverman:

> "It has been repeatedly held that men and women whose lives indicate an abandonment or lack of moral principles, and show them to be lewd and debased characters, void of shame or decency, have not usually a great respect for the truth or sanctity of an oath."

Witness Silverman should have been subject to cross-examination and impeachment as to any fact showing bad or defamed character, and as a witness could always be asked on cross-examination any question affecting his credibility even though it tended to disgrace or degrade him. See Wharton's Criminal Evidence, 12 Edition, §§880-881.

In People v. Webster, 139 N.Y. 73, the New York Court of Appeals stated:

> "It is now an elementary rule that a witness may be specifically interrogated upon cross-examination in regard to any vicious or criminal act of his life, and may be compelled to answer unless he claims his priv-

> ilege. A party who offers himself as a witness in a criminal case is not exempt from the operation of the rule. . . when he elects to become a witness, it is for all the purposes for which a witness may be lawfully examined in the case, and he is not, in the constitutional sense compelled to be a witness against himself, although when subjected to the test of a legitimate cross-examination, he may be required to make disclosures which tend to discredit or to incriminate him."

The right to an effective cross-examination is a constitutional right, derived from the Sixth Amendment's guarantee that every person charged with crime have an opportunity to confront his accusers. Pointer v. Texas, 380 U.S. 400, 404 (1965).

We are aware of course and reiterate that this does not mean that all limitations on cross-examination are constitutionally invalid. For example, the trial judge has the discretion to exclude repetitious questions and those that do no more than annoy, harass or embarrass the witness. E.g. United States v. Egenberg, 441 F.2d 441 (2nd Cir. 1971); United States v. Migliorino, 238 F.2d 7 (3rd Cir. 1956) and Martin v. Texas Emp. Ins. Ass'n., 193 F.2d 645 (5th Cir. 1952).

Nevertheless all issues concerning cross-examination do not dissolve upon invocation of the trial judge's discretion. This was certainly emphasized in United States v. Dickens, 417 F.2d 958, 961 (8th Cir. 1969), relying and citing Touhy

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v. United States, 88 F.2d 930, 934 (8th Cir. 1937):

> "It is only after the right of cross-examination has been substantially and thoroughly exercised that allowance of further cross-examination becomes discretionary with the trial court."

In precise terms, then, the trial judge's discretion insulated only his discretion once an area of cross-examination has been sufficiently explored and exhausted so that further inquiry would be pointless. United States v. Jorgenson, 451 F.2d 516, 519 (10th Cir. 1971) and United States v. Varelli, 407 F.2d 735, 751 (7th Cir. 1959).

With respect to the issue at bar we urge that a considerably more exacting standard applies when an Appellate Court is called upon to review a ruling which foreclosed altogether a valid area of interrogation. In United States v. Kartman, 417 F.2d 893, 897 (9th Cir. 1969) the Court thus stated:

> "Complete foreclosure of cross-examination as to a subject matter relevant to the witness' credibility, which may have deprived the jury of access to information bearing upon trustworthiness of crucial testimony, cannot be treated . . . as falling within the Court's discretion. . . ."

In denying a proper exploration into Silverman's lewd past frustrated the effectiveness of this truth-revealing device so vital and fundamental to our adversary system and effectively denied De

Pompeis his Sixth Amendment right to confrontation as secured under the United States Constitution.

The question therefore is whether the constitutional right to an effective inquiry and cross-examination as to any vicious or immoral acts that the witness Silverman may have committed during his life and more particularly leading to his admitted conviction embraces a coordinate right to search relevant facts upon which to predicate such cross-examination. To circumvent or limit this basic right is a substantial denial of a fair trial requiring judicial cognizance.

Point II

UPON LEARNING OF THE FACTS UNDERLYING A POTENTIAL CONFLICT OF INTEREST BETWEEN COUNSEL FOR CO-DEFENDANT AND THE KEY GOVERNMENT WITNESS AND THE EXONERATION BY THIS WITNESS OF THE CO-DEFENDANT IN AN OUT OF COURT STATEMENT TO CO-DEFENDANT'S COUNSEL ENURING TO THE BENEFIT OF DE POMPEIS, THE COURT SHOULD HAVE RESOLVED THE CONFLICT AFTER A HEARING AND ADVISED PETITIONER OF HIS RIGHT TO CALL COUNSEL ON THE MATTER OF THE EXONERATION OF CO-DEFENDANT AND THEREFORE HIS OWN PARTICIPATION IN THE CONSPIRACY.

De Pompeis invites the Court's attention to the petition for a Writ of Certiorari filed by Alberti in the October Term, 1972, of this Court. With respect to petitioner Alberti's contentions we adopt

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same in our legal argument for the granting of the instant Writ in that when Korjus advised his then counsel that Alberti was innocent of all the charges including the conspiracy count that this enured to the benefit of De Pompeis since he was likewise charged as a co-conspirator with Alberti. Moreover, although Korjus never uttered any testimony against De Pompeis by implication and inference, the jury could have found that when Korjus testified against Alberti they could likewise draw from all the evidence the conclusion that De Pompeis was a co-conspirator with her. On the other hand, had defense counsel for Alberti been called to testify by De Pompeis and related the exoneration by Korjus of Alberti this statement could have seriously effected the credibility of the key Government witness and the jury could have then found a contrary result as to Alberti as well as De Pompeis at least as to the conspiracy count. United States v. Steele, 469 F.2d 165 (10th Cir. 1972).

We maintain that the conclusions of the Court of Appeals mandate a new trial because of the very reasoning stated in the opinion hereto (O6a-7a), whereat it was stated:

> "We cannot understand how other counsel could be expected to ask the question that Alberti suggests; for, unless either Kenny breached the attorney client privilege or Korjus waived it, any other counsel would have been totally without knowledge of what Korjus had told Kenny. As a result, not only would other counsel not have asked the suggested question, but he would also not have

> been in a position to cross-examine Korjus as thoroughly and vigorously as Kenny did."

Moreso, when the Court of Appeals ruled that there was no conflict of interest it also made clear that De Pompeis was deprived of a proper interrogation of Korjus and was further denied the possibility of calling Kenny to the stand as a witness in order to explore any weak links in the Government's case as to the conspiracy as it effected Alberti and De Pompeis. De Pompeis did not have the benefit of the trial court's ruling permitting such an alternative and this seriously prejudiced his cause and necessitates a new trial. The Court of Appeals in connection to this matter stated (O7a):

> "Korjus had been indicted separately for his rule in the counterfeiting conspiracy, had pleaded guilty and been sentenced, and had already served his term of imprisonment at the time of the trial. Therefore, there was no longer any interest of Korjus that Kenny had to protect and that might have compromised his representation of Alberti."

The ruling made by the Court of Appeals was not made by the trial court.

At the very minimum, upon the findings made by the Court of Appeals this case should be remanded to the District Court for an evidentiary hearing on the matter of the dual representation by Alberti's trial attorney and the question of exoneration. The Court of Appeals indicated quite clearly (O5a-6a):

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"We should like to comment about the proper course of action for the trial judge to take when a potential conflict of interest with regard to counsel becomes apparent. With regard to the court's assignment of one attorney to represent several defendants, we have said in Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968) that:

> 'Where the trial judge assigns the same attorney to represent two or more defendants, he should do so only after conducting the most careful inquiry, as to which a full record should be made, and after satisfying himself that no conflict of interest is likely to result and that the parties involved have no valid objection.'

Similar considerations are involved when the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially competing interest is known to be a government witness. In such circumstances, the district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying

the potential conflict and is given an opportunity to express his or her views." (Emphasis supplied.)

Conclusion

For all the reasons stated herein, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROSENBERG, FUSFIELD & LOPEZ

s/ Frank A. Lopez
FRANK A. LOPEZ
Attorneys for Petitioner

Brooklyn, New York
January 31, 1973

FRANK A. LOPEZ
Of Counsel

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Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 429, 430—September Term, 1972.

(Argued December 4, 1972 Decided December 22, 1972.)

Docket Nos. 72-1888, 72-1889

UNITED STATES OF AMERICA,

Appellee,

v.

MARY ALBERTI and ALBERT DE POMPEIS,

Appellants.

Before:

LUMBARD, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from judgments of conviction in the District Court for the Eastern District of New York (Walter Bruchhausen, *J.*).

Affirmed.

GEORGE G. BASHIAN, JR., Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York, and L. Kevin Sheridan, on the brief), *for Appellee.*

STANLEY M. HYMAN, New York, N.Y. (Peter L. F. Sabbatino, on the brief), *for Appellant Mary Alberti.*

Opinion

FRANK A. LOPEZ, Brooklyn, New York, *for Appellant Albert De Pompeis.*

LUMBARD, *Circuit Judge:*

Mary Alberti and Albert De Pompeis appeal from judgments of conviction found in the Eastern District after a jury trial. The appellants were tried on an eleven-count indictment. Alberti was convicted on four counts: Count One, which charged possession of 20,000 counterfeit ten dollar bills in violation of 18 U.S.C. §§ 472 and 2, Counts Two and Three, which each charged a sale of counterfeit ten dollar bills in violation of 18 U.S.C. §§ 473 and 2, and Count Eleven, which charged a conspiracy with other named individuals to violate 18 U.S.C. §§ 472 and 473, in violation of 18 U.S.C. § 371. De Pompeis was also convicted on the conspiracy count, and on three others: Counts Eight, Nine, and Ten, each of which charged a sale of counterfeit ten dollar bills in violation of 18 U.S.C. §§ 473 and 2.[1] On June 21, 1972, the court sentenced Alberti to seven years imprisonment and De Pompeis to five years.[2]

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1 Counts Four, Five, Six, and Seven related to Anthony De Robertis, who was also indicted as a co-conspirator under Count Eleven. De Robertis had earlier entered a guilty plea to the conspiracy count and testified for the government at the trial below. He was not a co-defendant at the trial. It is not apparent what happened to De Robertis with regard to Counts Four, Five, Six, and Seven.

2 De Pompeis's sentence consisted of concurrent terms of five years for each of Counts Eight, Nine, Ten, and Eleven. Alberti's sentence was comprised of a seven-year term on each of Counts One, Two, and Three, and a five-year term on Count Eleven, all terms to run concurrently. Alberti had earlier been involved in a counterfeiting venture, for which she had been charged, pleaded guilty, and was placed on probation.

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Opinion

Alberti asserts two grounds for reversal: 1) that she was denied her sixth amendment right to the effective assistance of counsel because her retained counsel at trial had earlier represented Edward Korjus, who was a witness on behalf of the government; and 2) that she was denied a fair trial in violation of the due process clause of the fifth amendment by virtue of the assistant United States Attorney's cross-examination of her and by virtue of certain comments made by the assistant during his summation. De Pompeis' sole assertion on appeal is that the district court abused its discretion by not permitting his trial counsel to question Lawrence Silverman, a witness for the government, about the factual background of a prior misdemeanor conviction and thereby violated appellant's rights to confrontation and a fair trial. As we decide these contentions adversely to appellants, we affirm the judgments of conviction.

As the appellants do not challenge the sufficiency of the evidence to support the convictions, a brief summary of the government's proof will suffice. The government's evidence showed that Alberti approached Paul Hayman, a commercial printer, several times to solicit his services in support of a counterfeiting operation. This activity on the part of Alberti included several trips from New York City to Wilmington, Delaware where Hayman worked. The evidence also showed that Alberti was involved in finding buyers for the counterfeit bills after they were printed. De Pompeis was involved in secreting the counterfeit bills and arranging several sales of the bills to Lawrence Silver-

man. In essence, the government's evidence effectively established that Alberti, De Pompeis, Edward Korjus, and other named individuals conspired to violate the federal counterfeiting laws and that they had $200,000 in counterfeit bills printed. As indicated, both Korjus and Silverman were witnesses for the government at the trial below. Alberti testified in her own behalf and, in effect, admitted much of the government's evidence, but claimed that she was acting under coercion from one of the conspirators and on behalf of the government; and 2) that she was denied a fair trial in violation of the due process clause of the fifth amendment by virtue of the assistant United States Attorney's cross-examination of her and by virtue of certain comments made by the assistant during his summation. De Pompeis' sole assertion on appeal is that the district court abused its discretion by not permitting his trial counsel to question Lawrence Silverman, a witness for the government, about the factual background of a prior misdemeanor conviction and thereby violated appellant's rights to confrontation and a fair trial. As we decide these contentions adversely to appellants, we affirm the judgments of conviction.

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Alberti's claim that she was denied her sixth amendment right to the effective assistance of counsel stems from the fact that her trial counsel, Michael Kenny, had earlier represented one of the government witnesses, Edward Korjus.[3] Mr. Kenny informed the court of this earlier

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3 Korjus is an unindicted co-conspirator named in the indictment. He had earlier pleaded guilty to a counterfeiting charge in a separate indictment for his part in this conspiracy and was sentenced, prior to this trial, to two years imprisonment, of which sixty days were to be served and the remainder suspended. At the time of trial, he had served the period of confinement and was on probation. Michael Kenny had represented Korjus at the time the latter was sentenced for his involvement in the counterfeiting operation.

representation in open court prior to the commencement of the trial, and, again during the trial at a side-bar conference among Kenny, the government attorney, and the district judge. At this side-bar conference, Kenny stated that, while he was Korjus' lawyer, the latter had told him a story that "exonerated Alberti completely." Kenny asserted that he believed he would "have a right to ask [Korjus] any questions, even though I know information that he gave to me as a client." The trial judge made no further inquiry. Because of Korjus' alleged connection with Alberti in the conspiracy, she considers his testimony at the trial to have been most damaging to her defense. Therefore, Alberti argues that she was denied the effective assistance of counsel because Kenny did not, and because of the attorney-client privilege could not, ask Korjus whether or not he had earlier told Kenny an account of the counterfeiting operation that completely exonerated Alberti. She argues that another lawyer would not have been prevented by the attorney-client privilege from asking this question and that this would have greatly aided her defense.

We conclude that Alberti was not prejudiced by the fact that her counsel had also represented Korjus in the earlier proceeding. As we said in *United States* v. *Lovano*, 420 F.2d 769, 773 (2d Cir. 1970):

> The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from the joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel.

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Here there was no showing of prejudice. Korjus was not the only government witness who connected Alberti with this conspiracy. Paul Hayman, Terry Rogers, and Anthony De Robertis, all of whom were participants, also testified for the government and implicated Alberti. Korjus testified that Alberti went to Wilmington, Delaware to arrange for the bills to be printed and that she was the moving force in getting Hayman to agree to print the bills. The record shows that Alberti actually derived some advantage from the fact of Kenny's earlier representation of Korjus. Kenney's cross-examination of Korjus was lengthy and vigorous and was, no doubt, as Kenny stated to the trial judge, a result of the information that he had received from Korjus during the time that he represented him.

We find no merit in Alberti's contention that she was prejudiced by Kenny's failure to ask Korjus whether the latter had earlier exonerated Alberti of participation in the counterfeiting conspiracy. In the first place, it is not clear that Korjus had told Kenny simply that Alberti was innocent. Instead he may have related facts from which Kenny inferred Alberti's innocence, and which he used in structuring this thorough cross-examination of Korjus. Secondly, we cannot understand how other counsel could be expected to ask the question that Alberti suggests; for, unless either Kenny breached the attorney-client privilege or Korjus waived it, any other counsel would have been totally without knowledge of what Korjus had told Kenny. As a result, not only would other counsel not have asked

the suggested question, but he would also not have been in a position to cross-examine Korjus as thoroughly and vigorously as Kenny did.

Moreover, it should be noted that at the time of trial there was no real conflict between the interests of Alberti and those of Korjus. Korjus had been indicted separately for his role in the counterfeiting conspiracy, had pleaded guilty and been sentenced, and had already served his term of imprisonment at the time of the trial. Therefore, there was no longer any interest of Korjus that Kenny had to protect and that might have compromised his representation of Alberti. We conclude that Alberti was not denied the effective assistance of counsel.

We should like to comment about the proper course of action for the trial judge to take when a potential conflict of interest with regard to counsel becomes apparent. With regard to the court's assignment of one attorney to represent several defendants, we have said, in *Morgan* v. *United States*, 396 F.2d 110, 114 (2d Cir. 1968), that:

> Where the trial judge assigns the same attorney to represent two or more defendants, he should do so only after conducting the most careful inquiry, as to which a full record should be made, and after satisfying himself that no conflict of interest is likely to result and that the parties involved have no valid objection.

Similar considerations are involved when the court becomes aware of a potential conflict of interest with regard to a

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defendant's retained counsel, especially when the person with the potentially competing interest is known to be a government witness. In such circumstances, the district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views. Such a procedure by the district court would reduce the possibility that this court would feel obliged to reverse a conviction and order a new trial because defendant's counsel was inhibited by a conflict of interest. Under some circumstances, such as when the facts underlying the potential conflict are unclear or disputed, we might feel the necessity to remand to the district court for such a hearing, as we did in *Morgan*. However, this is not necessary here, for the underlying facts are clear and we have concluded that no actual conflict of interest existed to prejudice Alberti's defense.

Alberti's contentions with regard to the government's cross-examination of her and summation to the jury are similarly without merit. Her first contention in this regard is that she was denied a fair trial because the government cross-examined her about alleged threats that she made to Korjus in order to dissuade him from testifying. Defense counsel did not object to the questions. Alberti

claims that this constituted cross-examination about collateral crimes with which she was never charged, and was thus clearly improper. However, we recently noted that "[e]vidence of conduct designed to impede or prevent a witness from testifying is admissible as showing consciousness of guilt." *United States* v. *Cirillo*, —— F.2d ——, (November 6, 1972), slip op. 339, 351. Thus, it was proper for the government to question Alberti about this incident. The other allegations of prosecutorial misconduct in cross-examining Alberti are so clearly without merit as not to justify discussion.

Similarly, we do not believe that a discussion of Alberti's particular allegations of impropriety in the government's summation to the jury is merited. We do not feel that "[t]he prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Berger* v. *United States*, 295 U.S. 78, 85 (1935). We do not find that the government's summation distorted the record, as in *United States* v. *Tomaiolo*, 249 F.2d 683, 694 (2d Cir. 1957), or contained arguments on matters that were immaterial and could serve only to prejudice Alberti, as in *United States* v. *Bugros*, 304 F.2d 177 (2d Cir. 1962). As we said in *Bugros*, *supra*, p. 179:

> It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and to keep his arguments within the issues of the case.

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We find nothing in the government's argument before the jury to indicate that the assistant United States Attorney breached this duty and abused his position to deny thereby Alberti of her right to a fair trial.

Finally, appellant De Pompeis argues that the district court abused its discretion when it refused to permit his trial counsel to cross-examine Lawrence Silverman about the factual background of Silverman's New York conviction for third degree assault. However, inasmuch as the conduct involved does not relate to truthfulness or untruthfulness, we disagree with this contention and hold that the district court properly limited the cross-examination. See 3 Wigmore § 982 at p. 840; and Rule 608(b) of Proposed Federal Rules of Evidence for the United States Courts and Magistrates.

Affirmed.

Appendix B

Denial of Rehearing by the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of January, one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD,

HON. WILFRED FEINBERG,

HON. WALTER R. MANSFIELD,

Circuit Judges

- -

United States of America,
Plaintiff-Appellee,

v.

72-1888-89

Mary Alberti, Albert De Pompeis, and Anthony De Robertis,
Defendants,

Mary Alberti and Albert De Pompeis,
Defendants-Appellants.

- -

Denial of Rehearing by the Court of Appeals

A petition for a rehearing having been filed herein by counsel for the appellant, Albert De Pompeis,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk